Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DETROIT NEWSPAPER AGENCY,
Petitioner,

v.

DETROIT TYPOGRAPHICAL UNION, LOCAL 18,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

JOHN A. TAYLOR
DETROIT NEWSPAPER AGENCY
615 W. Lafayette Blvd.
Detroit, Michigan 48226
(313) 222-2425

ROBERT M. VERCRUYSSE *
DAVID B. CALZONE
GARY S. FEALK
VERCRUYSSE METZ & MURRAY, P.C.
31780 Telegraph Road, Suite 200
Bingham Farms, Michigan 48025
(248) 540-8019

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether Section 8(d) of the National Labor Relations Act and *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190 (1991), prohibit a court from ordering an employer to arbitrate the termination of a striking employee after the expiration of the collective bargaining agreement containing the obligation to arbitrate based on a job guarantee that had been expressly interrupted during the strike?

PARTIES TO THE PROCEEDING (RULE 14.1(b))

The caption of the case includes all parties to the proceeding in the district court and the court of appeals whose judgment is sought to be reviewed. The district court case also included a separately numbered companion case between the Graphic Communications International Union, Local 13-N and the Detroit Newspaper Agency. That case was not appealed to the court of appeals is not part of this appeal.

STATEMENT PURSUANT TO RULE 29.6

The Detroit Newspaper Agency (DNA) is a partnership between The Detroit News, Inc. and the Detroit Free Press, Incorporated. The Detroit News, Inc. is a wholly-owned subsidiary of Gannett Co., Inc. The Detroit Free Press, Incorporated is a wholly-owned subsidiary of Knight Ridder Newspapers, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Detroit Newspaper Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) was entered on March 14, 2002 and is published at 283 F.3d 779, and 169 L.R.R.M. (BNA) 2718. The March 3, 1998 opinion (App. *infra*, 18a-30a) of the district court is reported at 157 L.R.R.M. (BNA) 2742. The February 4, 1999 opinion of the district court (App., *infra*, 31a -47a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 14, 2002 (App., *infra*, 1a-17a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), is relevant to this petition and has been reproduced in the Appendix, *infra*, 78a-88a.

STATEMENT OF THE CASE

1. Overview of the Case:

In this action, the Detroit Typographical Union, Local 18 (DTU) sued to compel the Detroit Newspaper Agency (DNA) to arbitrate the discharges of certain striking employees pursuant to an arbitration clause contained in the parties' expired collective bargaining agreement. These discharged strikers were listed on the job guarantee rosters of memorandums of agreement between the DTU and the DNA. (App. *infra*, 134a-150a)

The applicable language of the memorandum of agreement is as follows:

> This guarantee shall be interrupted for the following reasons, for the duration of the incident, and restored at its conclusion:
>
> (1) *Strike or lockout.*
>
> (2) Disability of the guarantee holder.
>
> (3) Suspension of work opportunities through an Act of God which prevents composing room employees from working.
>
> (4) Leave of absence of the priority holder.
>
> (5) Time off for union business.
>
> (6) Service in the armed forces.

(App. *infra*, 138a; emphasis added)

The memorandum of agreement also states that the job guarantees can be terminated for various reasons:

(1) Resignation of the guarantee holder.

(2) Death of the guarantee holder.

(3) Just *cause separation of the guarantee holder, unless restored to his position through the appeal* provision of the labor contract.

(4) Attainment of sixty-fifth (65th) birthday by the guarantee holder.

(5) Permanent suspension of publication.

(App. *infra*, 138a-139a; emphasis added)

It is undisputed that these limited job guarantees were "interrupted" during the strike and that the discharges took place during the strike and were based on events that occurred during the strike. The DTU sought to enforce the job guarantees through the grievance and arbitration provisions of the collective bargaining agreement between the DTU and the DNA. (App. *infra*, 89a-133a) This collective bargaining agreement had expired prior to the strike and no successor agreement had been entered into either at the time that the discharges occurred or at the time that the DTU sought arbitration.

In the district court, the DTU sought an order compelling arbitration of the issue of whether the strikers' discharges were for just cause. The DNA responded by contending that the strikers' grievances were not arbitrable because their job guarantees had been interrupted during the strike and because the collective bargaining agreement providing for arbitration had expired. The district court refused to rule on the issue of whether the strikers' interrupted job guarantees provided them with a right to arbitrate their discharges. Instead, the district court held that this issue required consideration of the merits of the dispute and that the arbitrator must decide the

issue by interpreting the parties' agreement. (App. *infra*, 27a-28a; 37a-39a) An arbitrator subsequently held that the discharge of striker Gary Rusnell was arbitrable. The arbitrator also held that the DNA did not have just cause to discharge Rusnell for blocking ingress and egress to the DNA building. (App. *infra*, 151a-168a)

The DNA then filed an action in the district court seeking an order vacating the award. The district court refused to set aside the award, applying the limited standard of review applicable to arbitration awards. (App. *infra*, 67a-89a)

Both the initial district court action by the DTU to compel arbitration and the subsequent action brought by the DNA to set aside the award were appealed to the Court of Appeals for the Sixth Circuit.[1] The Sixth Circuit combined the two cases and issued an order affirming the holdings of the district court in both cases. (App. *infra*, 1a-17a)

2. The Strike:

The material facts in this petition are undisputed. This case arises out of a labor dispute involving the DNA, the Detroit News, Inc., the Detroit Free Press, Incorporated and six unions, including the DTU. On April 30, 1995, the collective bargaining agreements between these three employers and six unions expired, including the contract between the DNA and the DTU. (App., *infra*, 89a) On July 13, 1995, the DTU and the five other unions went on strike against all three employers. The strike lasted until February of 1997, when the DTU and the other unions made unconditional offers to return to work.

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[1] The discharges of all of the other striking limited job guarantee holders were resolved by the time the appeal was filed, leaving only the Rusnell discharge at issue in the appeal.

3. Discharged Strikers are not Recalled:

During the strike, the DNA permanently replaced the striking employees.[2] Upon receiving the unions' unconditional offers to return to work, the DNA began recalling strikers based on preferential hiring lists. Some DTU members were immediately recalled because they possessed limited job guarantees under the provisions of memorandums of agreement. (App. *infra*, 134a-150a)[3] Some strikers, however, had been discharged by the DNA during the strike for strike-related misconduct. Included among these discharged strikers were a few individuals who were listed on the job guarantee rosters. Discharged strikers were not recalled to work and were not placed on preferential hiring lists after the DTU made its unconditional offer to return to work. Gary Rusnell was one of these individuals, and he was listed on a job guarantee roster.

4. The DTU Requests Arbitration:

After the DTU's unconditional offer to return to work in February of 1997, the DTU filed grievances and requested arbitration over the issue of whether the terminated individuals listed on the job guarantee rosters were discharged for just cause. The DNA refused to arbitrate the grievances because the collective bargaining agreement providing the right to arbitration had expired and because the strikers' job guarantees were interrupted at the time they

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[2] Denying enforcement of an N.L.R.B. order, the D.C. Circuit held that the strike was an economic strike and that the DNA did not violate the National Labor Relations Act by permanently replacing the strikers. *Detroit Typographical Union No. 18 v. N.L.R.B.*, 216 F.3d 109 (D.C. Cir. 2000).

[3] The agreements were originally entered into by the DTU and the Detroit News, Inc. and Detroit Free Press, Incorporated. (App. *infra*, 134a) The job guarantee provisions were adopted by the DNA after it assumed the publishing and distribution functions of the Detroit News and the Detroit Free Press under the terms of a Joint Operating Agreement.

were discharged. The DTU maintained, however, that terminated holders of limited job guarantees had a right to arbitration under the terms of the expired collective bargaining agreement.

5. The District Court Compels Arbitration:

The DTU filed a Complaint in the United States District Court for the Eastern District of Michigan on September 5, 1997. The DTU's primary claim sought an order requiring the DNA to arbitrate the grievances of the discharged individuals.[4] Alternatively, the DTU sought to litigate the strikers' claims that they were discharged without cause in district court. Because the material facts of this case were not at issue, *both* the DTU and the DNA filed motions for summary judgment in the district court on the issues of whether arbitration was available to the discharged limited job guarantee holders and whether they had a right to just cause employment during the strike.

On March 3, 1998, the district court granted summary judgment in favor of the DTU and ordered the parties to submit the issue of whether the grievances were arbitrable to the arbitrator. (App. *infra*, 18a-30a) In doing so, the district court refused to rule on the issue of whether the interrupted

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[4] The Graphic Communications International Union, Local 13-N ("'GCIU'"), which is one of the other unions that went on strike against the DNA, also filed a Complaint against the DNA containing allegations that were substantially similar to the DTU's allegations. The DTU case, Eastern District of Michigan Case No. 97-CV-74551 and the GCIU case, Eastern District of Michigan Case No. 97-CV-74553 were consolidated before Judge Julian Abele Cook Jr. because they contained common issues of fact and law. The DNA and the GCIU resolved Case No. 97-CV-74553 during the course of litigation before the district court. The GCIU was a party to the district court's March 3, 1998 order, but not its later February 8, 1999 order concerning arbitrability. The GCIU was also not a party to the appeal to the Sixth Circuit Court of Appeals and is therefore not a party in this Petition.

job guarantees constituted vested rights under the Supreme Court's decision in *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190 (1991), so as to provide for enforcement under the arbitration provision of the expired collective bargaining agreement. Instead, the district court held that it was prevented from reaching the issues of whether the strikers possessed job guarantees during the strike and whether their discharges were arbitrable during the strike because that issue required consideration of the merits of the dispute. The district court therefore ordered the parties to arbitrate this arbitrability issue. (App. *infra*, 27a-28a) [5]

6. The District Court Clarifies Its Order Compelling Arbitration:

On September 18, 1998, the first arbitration between the DTU and the DNA concerning a discharge of a striker named John Martin was scheduled for a hearing before an arbitrator.[6] At the hearing, the DNA raised numerous defenses to the arbitrability of Martin's grievance, including the issue of whether the interrupted job guarantee gave rise to a right to arbitration under the arbitration clause of the expired collective bargaining agreement. The DTU objected and refused to proceed with the arbitration, claiming that the

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[5] Because the DTU had also asserted an alternative claim for breach of the job guarantee agreements in the event that it received an adverse ruling on the arbitrability issue, the district court stayed the proceedings pending a resolution of the arbitrability issue in arbitration. (App. *infra*, 28a) This order was not a final order and was not immediately appealable. The DNA therefore proceeded with arbitration and appealed the district court's rulings after a final order and separate judgment were issued by the district court on April 27, 2000. (App. *infra*, 48a-50a)

[6] Like Gary Rusnell, John Martin was a striker with an interrupted job guarantee who was discharged during the strike. His arbitration was scheduled prior to Gary Rusnell's arbitration. John Martin's grievance was ultimately settled by the parties because he decided to retire.

DNA was prohibited from objecting to the arbitrability of the grievances pursuant to district court's March 3, 1998 Order.

The DTU filed a Motion for Contempt on October 13, 1998, claiming that the DNA improperly objected to arbitrability at the arbitration. The basis for the DTU's motion for contempt was its argument that the district court's March 3, 1998 Order could not have required the parties to arbitrate the issue of whether its members possessed job guarantees during the strike. The DTU contended that such a ruling would have been contrary to *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643 (1986), which requires a court, not an arbitrator, to decide issues of substantive arbitrability. The DTU's motion was referred to a Magistrate Judge.

The Magistrate Judge issued a report and recommended order on November 18, 1998 that denied the DTU's motion for contempt and held that the district court had indeed ruled that issues of arbitrability must be decided by the arbitrator. The DTU objected to the Magistrate's report and recommended order.

On February 8, 1999, the district court issued an order denying the DTU's motion for contempt and clarifying its ruling on the issue of arbitrability. The district court clarified that its March 3, 1998 Order only held that the "subject matter" of the limited job guarantees was arbitrable and that the issue of whether the particular grievances asserted by the discharged employees were subject to arbitration was for the arbitrator to decide. (App. *infra*, 35a-39a) Subsequently, all of the DTU's outstanding grievances that were the subject of this litigation were settled by the parties without arbitration except for the grievance concerning Gary Rusnell's discharge.[7]

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[7] Like John Martin, these discharged strikers decided to retire in lieu of pursuing their respective grievances.

7. The District Court Enforces the Arbitrator's Award:

On December 16, 1999, Arbitrator Robert McCormick issued an award finding that Rusnell's grievance was arbitrable and finding that the DNA did not have just cause to terminate Rusnell. The DNA then filed a new lawsuit, Eastern District of Michigan Case No. 00-70580, seeking to set aside the Rusnell arbitration award. The district court, applying the limited standards for reviewing arbitration awards set forth in under *United Paperworkers v. Misco*, 484 U.S. 29 (1987), refused to set aside the arbitrator's award and dismissed the case.

8. Appeal To The Sixth Circuit:

Both the initial district court case brought by the DTU seeking to compel arbitration and the case brought by the DNA seeking to overturn the arbitration award were appealed to the Sixth Circuit Court of Appeals. The cases were consolidated for oral argument and decision. On March 14, 2002, the Sixth Circuit issued a published opinion affirming the district court's decisions in both cases. Specifically, the Sixth Circuit affirmed the district court's ruling that a court fulfills its obligation to determine the substantive arbitrability of a grievance by ruling generally that the dispute was "covered" by the arbitration agreement and leaving the issue of whether the particular grievance at issue is subject to arbitration for the arbitrator to decide. The Sixth Circuit also held that the job guarantees constituted vested rights under the Supreme Court's holding in *Litton Financial Printing Div. v. N.L.R.B., supra,* despite fact that the job guarantees were interrupted during the strike. The Sixth Circuit also held that the striking workers had a right to arbitrate whether their terminations were for just cause.

REASONS FOR GRANTING CERTIORARI

This case is of great significance because it involves the interplay between several competing labor law doctrines that converge in the oft-repeated scenario of a court being asked to determine if a grievance is arbitrable under the arbitration clause of an expired collective bargaining agreement. Although the Court has issued previous opinions regarding the role courts should play in determining whether a post-expiration grievance is arbitrable, there remains considerable confusion and conflict among the lower courts about the extent to which the courts can consider the merits of a dispute in ruling on arbitrability. There is also confusion about the effect other important federal labor law doctrines have on this determination.

This case magnifies the confusion and conflict among the lower courts because it requires the application of two federal labor law doctrines that are often at odds with one another. On the one hand, Supreme Court precedent holds that courts must determine the substantive arbitrability of a grievance by interpreting the collective bargaining agreement to the extent necessary to establish whether the parties agreed to arbitrate the dispute. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, (1960); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Litton, supra.* On the other hand, Supreme Court precedent holds that courts should not rule on the merits of a dispute in exercising their duty to interpret the agreement in order to determine substantive arbitrability. *AT&T Technologies, supra.* The tension between these two doctrines is particularly evident when courts are called upon to determine arbitrability in the context of an expired collective bargaining agreement. This occurs because the question of arbitrability typically hinges, as it does in this case, on a determination of whether an action taken after the expiration of a collective bargaining agreement infringes a right that accrued or vested under the agreement.

The determination of whether a right is accrued or vested sometimes appears to reach the merits of the dispute, when in reality, a court must address the issue in order to determine substantive arbitrability.

This case also addresses the interplay between the Court's decisions in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1967), and *Litton, supra*. Both cases address the scope of the two arbitrability doctrines in the context of expired collective bargaining agreements. The Sixth Circuit's decision in this case creates a conflict between the circuits regarding the proper application of these cases.

This case also involves the Sixth Circuit's misapplication of *Litton* in direct conflict with two other important and long-established labor law doctrines. The first doctrine is the statutory prohibition in Section 8(d) of the National Labor Relations Act (NLRA) against courts requiring an employer and a union to agree to any particular obligation in negotiations, including a right to just cause employment or to arbitration. *See H.K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970). The second doctrine is Supreme Court precedent recognizing that the *quid pro quo* of an agreement to arbitrate is an agreement not to strike. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUITS

The Sixth Circuit's affirmance of the district court's decision to refer to the arbitrator the issue of substantive arbitrability conflicts with *Litton, supra*. The affirmance also creates a split among the circuits over the extent to which a court is required to interpret a collective bargaining agreement in fulfilling its duty to determine if a grievance is substantively arbitrable.

In order to decide the issue of substantive arbitrability, the district court should have interpreted the contract to determine whether Gary Rusnell's discharge, which occurred during a strike and after the expiration of the collective bargaining agreement, was arbitrable based on the existence of a job guarantee that was, by its own terms, interrupted during the strike. *Litton, supra.* The district court refused to decide this issue, ultimately with the blessing of the Sixth Circuit, relying on *AT&T Technologies, supra,* for the proposition that courts should not decide the merits of the dispute in determining arbitrability. (App. *infra,* 27a-28a) The district court instead held that its obligation to determine substantive arbitrability was satisfied because the subject matter of "job guarantees" was generally "covered" by the arbitration agreement in the expired collective bargaining agreement. (App. *infra,* 25a-28a; 35a-39a) In affirming the district court, the Sixth Circuit opined that this holding fulfilled the district court's obligations under *AT&T Technologies,* even though the district court left for the arbitrator the issue of whether a discharged striker who had an interrupted job guarantee had a vested right under the expired agreement to arbitrate whether he was terminated for just cause. (App. *infra,* 10a) Yet that issue is quintessentially an issue of substantive arbitrability that should have been decided by the district court. *Litton, supra.*

The district court and the Sixth Circuit reached this conclusion by misapplying the holding in *AT&T Technologies.* In *AT&T Technologies,* the lower courts compelled arbitration of a layoff dispute without deciding the issue of arbitrability because the district court concluded that the union's interpretation of the collective bargaining agreement was at least "arguable" and that the court could not determine arbitrability without interpreting substantive provisions of the agreement. The Court reversed these decisions because ". . . the question of arbitrability—whether a collective-bargaining agreement creates a duty for the

parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Technologies*, 475 U.S. at 649. The Court also stated: "It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs. . . ." *AT&T Technologies*, 475 U.S. at 651. Thus, contrary to the Sixth Circuit's holding in this case, the district court did not satisfy its obligations to interpret the agreement and determine arbitrability under *AT&T Technologies* when it referred to arbitration the issue of whether Gary Rusnell's job guarantee provided him with a vested right to arbitrate his discharge during the strike.

The lower courts' rulings are also contrary to *Litton*, *supra*. In *Litton*, the union requested arbitration on the issue of whether the employer had improperly laid off employees after the expiration of the collective bargaining agreement without regard to seniority order. Similar to the district court's ruling in this case, the union in *Litton* argued that the issue of whether the seniority rights provision survived expiration of the agreement was, in fact, the merits of the dispute and that the Court's resolution of this issue would be improper. The Supreme Court disagreed, stating that even though there is a general presumption in favor of arbitrability:

> . . . we must determine whether the parties agreed to arbitrate this dispute, and **we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.**

Litton, 501 U.S. at 209 (Emphasis added); *See also First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 942-943 (1995) (a party cannot be forced to arbitrate the issue of arbitrability absent an explicit agreement to arbitrate arbitrability).

The Court also clarified its prior ruling in *Nolde*, *supra*. *Nolde* held that the parties' obligation to arbitrate survives the expiration of a collective bargaining agreement when the

obligation is arguably created by the expired agreement. *Nolde*, 430 U.S. at 252, *citing John Wiley & Sons, supra.*[8] In *Litton*, the Court held that *Nolde* did not announce a rule that post-expiration grievances concerning terms and conditions of employment always remain arbitrable. Instead, the Court held that arbitration is only available when a post-expiration grievance concerns vested rights under a collective bargaining agreement and announced a test for determining whether the grievant possessed a vested right:

> A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Litton, 501 U.S. at 205-206. The Court also held that the court is required to interpret the parties' agreement to the extent necessary to determine whether the grievance is based on a vested rights. *Id.*

Accordingly, in *Litton*, the Court interpreted the seniority provision of the parties' expired collective bargaining

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[8] In *John Wiley & Sons*, the Court held that substantive arbitrability issues, such as whether a party agreed to arbitrate a dispute concerning an alleged right under the collective bargaining agreement, are for judicial determination. The Court also held that procedural arbitrability issues, such as whether a particular grievance procedure step is applicable or whether a time limit precludes arbitration, are best left for the arbitrator. *John Wiley & Sons*, 376 U.S. at 554-58. As indicated, this case involves an issue of substantive arbitrability, which is whether interrupted job guarantees provided strikers with the right to arbitrate whether their discharges were for just cause. The district court improperly applied *John Wiley* when it characterized its decision as a determination that the subject matter of the job guarantees was arbitrable, because it refused to address the issue of whether the DNA agreed to arbitrate the grievances of the strikers with interrupted job guarantees.

agreement in order to determine the arbitrability issue of whether or not the employees had a vested right to a particular order of layoff. Because the Court found that no vested right concerning the order of lay off existed under the contract, it ruled that the employer was not obligated to arbitrate the merits of the dispute. The district court should have conducted the same analysis in this case regarding the interrupted job guarantee but refused to do so, and the Sixth Circuit affirmed that decision.

The holding in *Litton* seemed to clearly provide that the rule that courts should avoid addressing the merits of the dispute in determining substantive arbitrability must be subordinate to the rule that courts have an obligation to interpret the agreement to the extent necessary to determine substantive arbitrability even if this interpretation might implicate the merits of the dispute. Nonetheless, the lower courts continue to profess confusion about the scope of a party's right to a judicial determination of substantive arbitrability because *Litton* expressly disavows that it overruled *Nolde*. *Litton*, 501 U.S. at 205-206.

For example, in *Luden's Inc. v. Local Union No. 6, Bakery, Confectionary and Tobacco Workers*, 28 F.3d 347 (3d Cir. 1994), the Third Circuit had the opportunity to examine the interplay between the two competing arbitrability principles at issue in this case. The Third Circuit observed that other circuits faced with the issue have held that *Litton* impliedly overruled the portion of *Nolde* holding that a court may not look at the merits of the claim in resolving whether the parties have agreed to arbitrate the grievance.[9] *Luden's*, 28 F.3d at

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[9] The Third Circuit believed that The Fourth Circuit in *Cumberland Typographical Union No. 244 v. The Times Alleganian Co.*, 943 F.2d 401 (4th Cir. 1991), and the Sixth Circuit in *International Brotherhood of Teamsters, Local Union 1199 v. Pepsi Cola General Bottlers, Inc.*, 958 F.2d 1331 (6th Cir. 1992), and *Cincinnati Typographical Union No. 3, Local 14519 v. Gannett Satellite Information Network, Inc.*, 17 F.3d 906

354. The Third Circuit, "being reluctant to follow their course," avoided the issue completely by holding:

> Because we conclude that Luden's contractual duty to arbitrate grievances never lapsed completely, this avenue provides the route whereby we may avoid addressing the uncertain interplay between *Nolde* and *Litton* **though we express hope that the Supreme Court will take on that challenge itself.**

Luden's, 28 F.3d at 354. (Emphasis added)

The Seventh Circuit directly resolved the uncertain interplay between the two competing arbitrability rules by finding that the rule that courts must resolve the arbitrability of a grievance takes precedence over the rule that courts should avoid addressing the merits of a grievance. In *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993), the district court made essentially the same decision that the district court in this case made, which was to send the case to arbitration without determining whether the grievance at issue was arbitrable. The arbitrability issue in *Hyster* was very similar to the arbitrability issue in this case. The parties' collective bargaining agreement provided for medical insurance for unit employees. The company implemented changes to the medical insurance benefits for retired employees. Upon learning of the changes in retiree insurance, the union filed a grievance and demanded arbitration. The company responded that arbitration was not available to *retired* employees under the terms of the collective bargaining agreement. The district court referred this arbitrability issue to the arbitrator because it believed that deciding whether retired employees were covered by the

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(6th Cir. 1994), had issued opinions relevant to this issue. *Luden's*, 28 F.3d at 354, n. 10. However, a close reading of these opinions show that they do not address the interplay between *Nolde* and *Litton* or the tension between the rules that courts should not interpret the merits of the dispute and the rule that courts must determine substantive arbitrability.

arbitration provision of the collective bargaining agreement would require it to interpret the contract and rule on the merits of the dispute. *Independent Lift Truck Builders Union v. Hyster Co.*, 803 F. Supp. 1367, 1371 (C.D. Ill. 1992).

On appeal, the Seventh Circuit, relying on *Litton*, reversed the district court's holding:

> . . . the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it . . . .

Hyster, 2 F.3d at 236-237; *See also Local 744, International Brotherhood of Teamsters v. Hinkley & Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996).

The Sixth Circuit's holding in this case has therefore created a split among the circuits because it is directly contrary to the Seventh Circuit's ruling in *Hyster*. The Sixth Circuit's holding requires a court to send the issue of arbitrability to the arbitrator if the Court's interpretation of the contract could impact the merits of the grievance. Other circuits addressing this issue post-*Litton* have not directly resolved this conflict but have in principle followed the Seventh Circuit's approach in *Hyster*. *See Oil, Chemical, & Atomic Workers v. Conoco, Inc.*, 241 F.3d 1299, 1304-1305 (10th Cir. 2001); *Bell Atlantic-Pennsylvania, Inc. v. Communications Workers of Am., Local 1300*, 164 F.3d 197, 201 (3d Cir. 1999); *Kansas City S. Transport Co. v. Teamsters Local #41*, 126 F.3d 1059, 1067 (8th Cir. 1997). *See also Local Union No. 637, International Brotherhood of Electrical Workers v. Davis H. Elliot Co.*, 13 F.3d 129, 132-133 (4th Cir. 1993) (court's duty to determine arbitrability is limited to determining whether the subject matter of the grievance is arbitrable—but a court must decide whether the parties intended to arbitrate the grievance issues).

The rulings below also reveal a fundamental misunderstanding of what constituted the "merits" of the dispute between the DTU and the DNA. The "merits" of Gary Rusnell's grievance related to whether he was discharged for just cause, thereby terminating his job guarantee, *not whether arbitration was a vested right available during a strike to a discharged employee who had an interrupted job guarantee.* This latter issue was clearly an issue of substantive arbitrability that should have been decided by the district court and would not have required a determination of whether the striking employees were properly discharged. *Litton, supra.*

The critical flaw in the reasoning of both the district court and the Sixth Circuit can perhaps best be illustrated by the fact that their rulings create the potential for inconsistent conclusions about arbitrability by the courts and the arbitrator. The district court ruled that the dispute was *arbitrable* because it could not say "with positive assurance" that grievances over the general subject matter of job guarantees were not "covered" by the arbitration clause of the expired agreement. At the same time, however, the district court allowed the arbitrator to determine whether the interruption of the job guarantee during a strike meant that there was no right to arbitrate the issue of whether discharged strikers were terminated for just cause. In other words, the arbitrator was free to decide that the dispute was really *not arbitrable* because the job guarantee had been interrupted,[10] even though the district court had previously held that the dispute was *arbitrable.* Clearly, granting such license to the arbitrator violates the long standing principle in *John Wiley* that substantive arbitrability is for the district court to decide.

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[10] As the Sixth Circuit noted, the arbitrator clearly determined the issue of arbitrability: "'Arbitrator Robert A. McCormick ruled that the grievance was arbitrable.'" (App. *infra*, 10a-11a)

II. THE DECISION BELOW EXPANDS THE *LITTON* TEST IN CONFLICT WITH SECTION 8(d) OF THE NLRA AND SUPREME COURT PRECEDENT PROVIDING THAT ARBITRATION IS A QUID PRO QUO FOR AN AGREEMENT NOT TO STRIKE

The *Litton* test for determining whether a post-expiration grievance is arbitrable permits a court to interpret a contract to the extent necessary to determine arbitrability, but it does not go so far as to permit a court to rewrite the agreement of the parties. In this case, the Sixth Circuit attempted to justify the district court's refusal to consider the issue of arbitrability by stating that it agrees with the union's interpretation of the limited job guarantee because "it is actually the only fair reading of the guarantee." (App. *infra*, 10a-11a) The Sixth Circuit stated that it believed that the "interruption" of the job guarantee only provided "a respite for the employer from paying wages and providing benefits" to job guarantee holders during the strike. (App. *infra*, 11a)

The *Litton* test only allows a court to interpret a contract to determine whether the grievance at issue involves a vested right under "normal principles of contract interpretation." *Litton*, 501 U.S. at 205-206. Normal principles of contract interpretation do not allow the court or the arbitrator interpreting the contract to ignore the plain language of the agreement in determining whether a vested right exists. Even under the limited standards for reviewing arbitration awards, arbitrators (and courts) are prohibited from ignoring the plain language of an agreement. *United Paperworkers v. Misco, supra*. As such, the Sixth Circuit should have confined its inquiry to the question of whether an interrupted job guarantee created a vested right to just cause employment and to arbitration under an expired collective bargaining agreement during the period of the interruption. The Sixth

Circuit, however, went beyond this *Litton* mandate by redefining what the interruption of a job guarantee means based on its own "fair reading" of the agreement.[11]

The Sixth Circuit went beyond a determination of the "vesting" issue and held that the DNA's interpretation of the interruption of the limited job guarantee was "unreasonable" because it would allow the DNA to terminate employees without recourse not only when they were on strike, but also when they were on disability leave, in the armed services, absent on union business or when the operation of the newspaper was suspended due to an Act of God. The Sixth Circuit did not think that the scope of such a provision was "fair" so the court completely ignored the meaning of the term "interruption" and essentially wrote this language out of the agreement.

The "interruption" of the job guarantee does no more than place employees with limited job guarantees on the same footing as other employees when one of the listed events (strike, disability leave, military leave, etc.) occurs. It does not give the DNA the unfettered right to terminate a job guarantee employee without recourse during the interruption of the job guarantee *unless that right existed with respect to other employees who were not subject to the job guarantee.*

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[11] The two cases cited by the Sixth Circuit in support of its decision illustrate that the Sixth Circuit failed to rule on the fundamental issue in this case, which is whether an interrupted right is "'vested"' during the period of the interruption. In *Cumberland Typographical Union No. 244 v. The Times Alleganian Co.*, 943 F.2d 401, 403, n.1 (4th Cir. 1991), the parties agreed that the job guarantee agreement remained in effect after the expiration of the collective bargaining agreement and that the arbitration clause of the collective bargaining agreement was binding on the dispute. In *Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Ass'n*, 853 F.2d 506, 510, n. 8 (7th Cir. 1988), the court did not decide whether the job guarantees contained in the supplemental agreement could be enforced if the main collective bargaining agreement was no longer in effect.

For example, if an employee with an interrupted job guarantee is terminated while on disability leave but the collective bargaining agreement is in effect during the disability leave, the employee can utilize its provisions like any other employee to seek arbitration on the issue of whether his termination was without just cause. But in the case of a strike, when the collective bargaining agreement has expired, a striking employee with an interrupted job guarantee has no greater right to arbitration than any other striking employee.

Based on its own misguided notions of what is "fair," the Sixth Circuit violated Section 8(d) of the NLRA by imposing an obligation to arbitrate on the DNA where none existed. In doing so, the Sixth Circuit modified the parties' agreement by holding that the right that was interrupted was the right to payment of wages and benefits during the strike. This is clearly contrary to the plain language of the agreement, which states that the job guarantee *itself* is interrupted.[12]

The Sixth Circuit's decision was also made without any mention or consideration of the well-established doctrine that an agreement to arbitrate is the *quid pro quo* for an agreement not to strike. *Textile Workers v. Lincoln Mills,* 353 U.S. 448,

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[12] The Sixth Circuit's holding makes no sense because it suggests that without the "interruption" provision, the DNA would somehow be obligated to pay employees while they are on strike, on a medical leave, off for union business, or serving in the armed forces. Even more troubling is the Sixth Circuit's declaration that the DNA has provided no authority for the proposition that the interruption of the job guarantee "permits an employer to terminate a guarantee holder without just cause *or one of the other listed grounds for termination.*" (App. *infra*, 11a, emphasis added) Carrying this analysis to its logical conclusion, the Sixth Circuit is stating that if a job guarantee holder resigned during a period of interruption, the DNA would still have to guarantee that person a job until the period of the interruption ceased. Moreover, if an employee died during the period of interruption, the DNA would still have some sort of obligation to guarantee the deceased a job until the period of interruption ceased.

455 (1957); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960). Although the Sixth Circuit redefined the meaning of what constitutes an interrupted job guarantee based on its own notions of what is fair, the court completely ignored the fact that there is nothing unusual about the inclusion of language suspending the job guarantee's just cause termination protection during a strike. The Memorandum of Agreement was not created in a vacuum. It was a collectively bargained supplemental agreement, in which the parties recognized the possibility of strikes and the expiration of the parties' primary collective bargaining agreements during the term of the Memorandum of Agreement. The Memorandum of Agreement therefore explicitly provided, in keeping with the traditional *quid pro quo* concept, for the interruption of the job guarantees during a strike.

The Sixth Circuit's duty to apply traditional principles of contract interpretation, as set forth in *Litton*, requires the court to at least consider federal labor policy and doctrines underlying collective bargaining agreements. Indeed, if federal labor policy is to be given effect, courts cannot refuse to recognize labor law doctrines that create the underpinnings of a collectively bargained agreement. In this case, which involves a claim to arbitrate the post-expiration discharges of strikers, the court was required to at least consider the traditional *quid pro quo* in order to comply with the *Litton* test. This quintessential labor law principle simply cannot be completely ignored by the Sixth Circuit if it is to apply "normal principles of contract interpretation" in determining whether a vested right to a job guarantee existed during the strike. The DNA submits that courts applying the *Litton* test not only have the obligation to give effect to clear contract language, like the language interrupting the job guarantee during a strike, but they must consider traditional labor law doctrines that may have formed the basis of the bargain in interpreting ambiguous contract language to determine

whether a vested right exists. The Sixth Court's decision in this case has altered the *Litton* test and violates Section 8(d) by giving courts *carte blanche* make a determination as to what contract terms would be "fair" instead of applying normal principles of contract interpretation to determine what the parties agreed to in collective bargaining.

In effect, the decision of the Sixth Circuit rewrites the parties' agreement which interrupted the job guarantees during the strike. While the job guarantees were interrupted, the effected employees were merely placed in the same position as any other striker—they had no right to just cause employment and no right to arbitrate the propriety of discharges that occurred during the strike. By writing the "interruption" language out of the parties' contract, the Sixth Circuit's decision improperly uses *Litton* as a vehicle for violating Section 8(d). The Sixth Circuit's decision, which gives courts license to impose contract terms on parties under the auspicious of determining vested rights, is contrary to long standing federal labor policy and Supreme Court precedent and therefore warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN A. TAYLOR
DETROIT NEWSPAPER AGENCY
615 W. Lafayette Blvd.
Detroit, Michigan 48226
(313) 222-2425

ROBERT M. VERCRUYSSE *
DAVID B. CALZONE
GARY S. FEALK
VERCRUYSSE METZ & MURRAY, P.C.
31780 Telegraph Road, Suite 200
Bingham Farms, Michigan 48025
(248) 540-8019

* Counsel of Record

Attorneys for Petitioner